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No.: 83-265

IN THE

Supreme Court of the United States

October Term, 1983

DENISE A. CHAFFEE,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONER'S REPLY IN SUPPORT OF HER PETITION

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Dated: 5 October 1983

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Petitioner files this Reply to respond to some statements of the respondent which would otherwise give a misleading impression of the case.

First, respondent argues that since two of the cases decided together with Feres v.

United States, 430 U.S. 135 were military medical neglect claims (Resp.2), all alleged cases of military medical malpractice were intended to be included within the preclusive strictures of Feres, supra.

That may have been the initial thrust of the decision. Petitioner, however, has shown that, due to the judicial erosion of some of the bases that initially supported Feres (Pet. 8-12) along with other changes and inconsistencies in the application of the law (Pet. 17-22; 28-30), some of which were perhaps not forseen or contemplated by this Court, there has evolved an overwhelming national sentiment, both within and without the judiciary, pressing for changes in that aspect of the Feres rule (Pet. 30-35).

Accordingly, this Court should review whether there is still a rational justification for the continued application of the Feres preclusion in instances of alleged military medical neglect.

Second, respondent cites the recent cases of Stencel Aero Engineering Corp. v. United

States, 431 U.S. 666 (1977) and Chappell v. Wallace, No. 82-167 (June 13, 1983) as reaffirming the considerations underlying Feres and giving further support to the lower court's dismissal of petitioner's complaint.

Such a broad characterization, however, is misleading. For example, one of the initial considerations of Feres was the so-called lack of " parallel private liability" Id. at 142. That consideration, however, was rejected in United States v. Muniz, 374 U.S. 150; consequently, that factor was not reaffirmed by the abovementioned cases.

The essence of the case at bar, however, is not so much whether Stencel and Chappell, supra reaffirm Feres but rather whether the remaining principles should continue to apply to military medical neglect cases.

In fact, petitioner specifically refers to Chappell, supra and distinguishes it from the instant cases by showing that the two " special factors" which barred suits by servicepersons against superior officers were not applicable or available to petitioner

in the instant case (Pet. 22-23).

Third, respondent suggests that since a number of petitioner's arguments rest on policy considerations, they should be addressed to the legislative branch rather than to the courts (Resp.3). Since when are policy considerations exclusively within the purview of legislative consideration? Surely, the decision in Feres was based on several policy considerations, Id, at 142-145. The rationale underlying many other decisions of this Court are based on particular policy considerations.

In the instant case, petitioner is asking the Court to examine the continued applicability of the policy considerations in Feres to military medical malpractice cases. It is only reasonable and obvious that this Court should be able to review its own policy considerations and, thus, respondent's contention to the contrary is unwarranted.

Furthermore, the respondent has incorrectly characterized the nature of the Petition as enlargement of the waiver of

sovereign immunity of the United States accorded by the Federal Torts Claims Act, hereinafter referred to as the FTCA. Respondent, therefore, asserts that only Congress has the power to enlarge upon its own statutes (Resp. 3).

The fact remains, however, that in Feres this Court narrowed the scope of the FTCA by creating its own exception to the FTCA. Has the government ever contended that only Congress should have narrowed the scope of its own statute? Certainly not.

Petitioner is seeking to remove alleged cases of military medical neglect from the Feres proscription. Petitioner, therefore, does not wish to enlarge upon the original provisions of the FTCA but rather to restore to a class of military citizens a right that was incorrectly denied them by this Court thirty-three years ago.

Fourth, respondent generally cites Illinois Brick Co. v. Illinois, 431 U.S. 720 736 (1977) and Hodel v. Indiana, 452 U.S. 314, 333 (1981) in furrher supporting its

contention that Congress, rather than this Court, is the appropriate forum for review of the matter before the bar (Resp. 4).

The instant case, however, is distinguishable from the above cited cases in that petitioner here is not seeking to have the Court overrule or interpret a particular provision of a statute. Rather, petitioner is asking this Court to review the viability of certain applications of its own court made exception to the FTCA.

Under those circumstances, the review sought by petitioner in this Court is indeed most appropriate.

Perhaps the most significant aspect of respondent's answer to petitioner's brief is the silence on the many issues and policy matters discussed in her brief. The numerous and varied arguments put forth by petitioner are succinctly dismissed as a "catalogue of reasons" which should be reviewed by Congress and not by this Court (Resp. 3).

It would appear, therefore, that the

substance of petitioner's arguments have generally gone unchallanged. Rather, there is an effort to divert one from the substance of the brief by placing an inordinate stress that Congress should be the arbiter in this matter.

Conclusion:

If, in the light of a reasoned evaluation, this Court concludes that petitioner's arguments in support of the changes sought are lacking in merit, then denial of her Petition is in order. However, to ignore the many factors articulated in petitioner's brief because respondent contends that such arguments should be addressed to the legislative branch would, unfortunately, reflect an abdication of this Court's rightful function to review those aspects of the law which clearly need to be reexamined.

The legislature certainly has not corned the market in this area. The fact remains, that this Court, and not Congress, created the Feres exception to the FTCA; and

therefore, it is most appropriate that this Court be the forum for the reconsideration of Feres as it applies to alleged instances of military medical neglect.

It may be that, under particular circumstances or when certain legal theories prevail, some laws, though appearing harsh on the surface, seem justified for the greater good of society.

However, in the course of time's passage, changes in policy or legal theories may no longer support or warrant the continued application of such laws or portions thereof. Unfortunately, the wheels of judicial and legislative change turn slowly due to the intrinsic inertia of the systems.

In the interim between the identification and solution of a given problem in the law, many individuals find themselves hapless victims of the aforementioned inertia and are denied appropriate legal recourse.

Petitioner is such a victim. The problem has long been identified, criticized, and the

momentum is definitely in the direction of change. It is hoped, therefore, that this petition will provide the needed impetus to prompt this Court to undertake the long overdue reexamination of the legal rights of the medically neglected in the military.

Petitioner prays that her Petitiin be granted.

Dated 5 October 1983

Respectfully submitted,

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CERTIFICATE OF SERVICE

Fall River, Massachusetts
7 October 1983

I, Robert W. Guimond, hereby certify that I have this day served three copies of PETITIONER'S REPLY IN SUPPORT OF HER PETITION by mailing same, postage paid, to the Solicitor General, Department of Justice, Washington, D.C. 20530, and mailing three copies to Assistant United States Attorney Charles K. Mone, Esq., Office of the United States Attorney, Post Office and Courthouse Building, Boston, Massachusetts 02109.

Robert W. Guimond

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